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In the
Supreme Court of the United States

October Term, 1996

City of St. Petersburg, Florida
Petitioner,

v.

William A. Bowen, as Trustee of
the William A. Bowen Trust Agreement,
Respondent.

On Petition for a Writ of Certiorari
to the District Court Of Appeal of Florida
Second District

PETITION FOR A WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED FOR REVIEW

Does A Municipal Nuisance Abatement Board Order Requiring The One-Year Closure Of A Building That Is A Public Nuisance Because Of Its Continual Use In Illegal Drug Sales Require Compensation Under The Constitution's Fifth Amendment?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, the City of St. Petersburg, Florida, and Respondent, William A. Bowen, as Trustee of the William A. Bowen Trust Agreement. The State of Florida filed an amicus brief.

TABLE OF CONTENTS

Page

Question Presented i
List of Parties ii
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Constitutional Provision, Statute and Ordinance Involved 2
Statement of the Case 3
Reasons for Granting the Petition 4

I. The District Court of Appeal's Interpretation of the Fifth Amendment's Requirements Regarding Just Compensation Conflicts With This Court's Decisions 5

II. The District Court of Appeal's Decision Creates a Conflict Among State Courts and Threatens the Ability of Government to Abate Traditional Public Nuisances 8

Conclusion 10
Appendix A 1a
Appendix B 12a
Appendix C 13a
Appendix D 15a
Appendix E 18a
Appendix F 24a
Appendix G 26a

TABLE OF AUTHORITIES

CASES: PAGE

Bennis v. Michigan, 116 S. Ct. 994 (1996) 5, 7

City of St. Petersburg v. Bowen, 675 So. 2d 626 (Fla. Dist. Ct. App. 1996) ..... *passim*

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 4, 5

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

Minot v. Freelander, 426 N.W.2d 556 (N.D. 1988) 8

Pardo v. Florida, 596 So. 2d 665 (Fla. 1992) 8

Porter v. DiBlasio, 93 F.3rd 301 (7th Cir. 1996) 5

Raynor v. Maryland Dept. of Health and Mental Hygiene, 110 Md.App. 165, 676 A.2d 978 (1996) 8

Starzenski v. Elkhart, 659 N.E.2d 1131 (Ind. Ct. App.), *petition for cert. filed*, 65 U.S.L.W. 3181 (U.S. Aug. 29, 1996) (No. 96-350) 8

STATUTES:

Ala. Code § 6-5-155.1(3) (Supp. 1996) 9

Ala. Code § 6-5-156.3 (Supp. 1996) 9

Alaska Stat. § 09.50.170 (1995) 9

Alaska Stat. § 09.50.210 (1995) 9

Ark. Code Ann. § 16-105-402 (Michie Supp. 1995) 9

Ark. Code Ann. § 16-105-412 (Michie Supp. 1995) 9

Cal. Health & Safety Code § 11570 (West 1991) 9

Cal. Health & Safety Code § 11573.5 (West 1991) 9

Colo. Rev. Stat. Ann. § 16-13-303 (West Supp. 1996) 9

Colo. Rev. Stat. Ann. § 16-13-309 (1990) 9

Conn. Gen. Stat. Ann. § 21a-259 (West 1994) 9

STATUTES:	PAGE
1832 Fla. Terr. Laws No. 55, § 47	6, 7
1917 Fla. Laws ch. 7367, § 1	6, 7
Fla. Stat. § 823.10 (1995)	6, 7
Fla. Stat. § 893.138 (1995)	6, 7
Ill. Comp. Stat. Ann. ch. 720, ¶ 5/37-1 (West 1993)	9
Ill. Comp. Stat. Ann. ch. 720, ¶ 5/37-4 (West 1993)	9
Mass. Ann. Laws ch. 139, § 16 (Law. Co-op. 1995)	9
Mass. Ann. Laws ch.139, § 16A (Law. Co-op. 1995)	9
Mich. Comp. Laws Ann. § 600.3801 (West 1987)	9
Mich. Comp. Laws Ann § 600.3810 (West 1987)	9
Miss. Code Ann. § 41-29-309 (1993)	9
Miss. Code Ann. § 95-3-15 (1993)	9
Mo. Ann. Stat. § 195.130 (Vernon 1996)	9
N.H. Rev. Stat. Ann. § 318-B:16 (Supp. 1995)	9
N.H. Rev. Stat. Ann. § 544:31 (Supp. 1974)	9
N.J. Stat. Ann. § 24:21-35 (West Supp. 1996)	9
N.J. Stat. Ann. § 2C:33-12.1(West 1996)	9
N.C. Gen. Stat. § 19-1.2 (Michie Supp. 1996)	9
N.C. Gen. Stat. § 19-5 (Michie Supp. 1996)	9
Or. Rev. Stat. § 105.555 (1989)	9
Or. Rev. Stat. § 105.580 (1989)	9
42 Pa. Cons. Stat. Ann. § 8382 (West Supp. 1996)	9
Utah Code Ann. § 78-38-9 (1996)	9
Va. Code Ann. § 18.2-258 (Michie 1996)	9
Va. Code Ann. § 18.2-258.01 (Michie 1996)	9
Wash. Rev. Code Ann. § 7.43-010 (West 1992)	9
Wash. Rev. Code Ann. § 7.43.090 (West 1992)	9
Wis. Stat. Ann. § 823.113 (West 1994)	9

No. 96_____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

CITY OF ST. PETERSBURG, FLORIDA,
Petitioner,

v.

WILLIAM A. BOWEN, as Trustee of the William A. Bowen Trust Agreement,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

The City of St. Petersburg respectfully petitions for a writ of certiorari to review the judgment and opinion of the District Court of Appeal Second District, State of Florida in this case.

OPINIONS BELOW

The opinion of the District Court of Appeal (App., *infra*, 1a) is reported at 675 So. 2d. 626 (Fla. Dist. Ct. App. 1996). The opinion of the Circuit Court of Pinellas County, Florida is unreported and is incorporated into the District Court of Appeal opinion (App., *infra*, 4a). The Findings of Fact, Conclusions of Law and Order of the Nuisance Abatement Board of the City of St. Petersburg, Florida (App., *infra*, 13a) are unreported.

JURISDICTION

The District Court of Appeal entered its judgment on May 22, 1996 (App., *infra*, 1a). The Supreme Court of Florida

declined to exercise its jurisdiction on August 29, 1996 (App., *infra*, 12a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION, STATUTE AND ORDINANCE INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part that "nor shall private property be taken for public use, without just compensation."

Section 893.138, Florida Statutes is set forth in the Appendix (App., *infra*, 15a).

Sections 19-66 through 19-71 of the St. Petersburg City Code are set forth in the Appendix (App., *infra*, 18a).

STATEMENT OF THE CASE

In 1987, the Florida legislature authorized municipalities to create administrative boards to hear complaints about, *inter alia*, drug-related public nuisances. 1987 Fla. Laws ch. 87-243, § 7. Such boards are empowered to declare a place or premises to be a public nuisance and to enter an order to abate such a nuisance. The order may require the closing of the premises for up to one year. Pursuant to this statutory scheme, the City of St. Petersburg created a Nuisance Abatement Board (NAB) in 1989. St. Petersburg, Fla., Ordinance No. 1137F, §1 (Nov. 2, 1989).

William A. Bowen acquired The Lorraine Apartments, a fifteen-unit building located in St. Petersburg, in 1991. In 1993, the NAB notified Bowen that it would hold a public hearing concerning allegations of drug-related activity at The Lorraine Apartments. After the hearing, the NAB found that The Lorraine Apartments were used on four occasions within a six-month period as the site for the unlawful sale or delivery of cocaine. Accordingly, the NAB declared The Lorraine Apartments to be a public nuisance and, to abate the nuisance, ordered the premises closed for one year. Bowen did not challenge the validity of the NAB's actions.

Instead, Bowen filed a complaint in the Circuit Court of Pinellas County, asserting that he had suffered a taking of his private property for which just compensation was due. Bowen moved for partial summary judgment on the issue of just compensation under the United States Constitution. The Circuit Court found that the NAB's order had deprived Bowen of all economic use of The Lorraine Apartments for one year. Granting Bowen's motion, the Circuit Court rejected the City of St. Petersburg's contention that the abatement of illegal drug activity required no compensation. The Circuit Court concluded that *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), mandated the payment of just compensation.

On appeal, the District Court of Appeal adopted the Circuit Court's opinion and affirmed. The Supreme Court of Florida declined to exercise its jurisdiction on August 29, 1996.

REASONS FOR GRANTING THE PETITION

This case presents a timely opportunity for the Court to reaffirm and strengthen the principle set out in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-492 (1987), that where property is being used for an illegal purpose, in this case the sale of drugs, then state and local governments may protect the community by abating such use as a public nuisance without violating the Just Compensation Clause of the Fifth Amendment.

The District Court of Appeal stated that "*Lucas* [*v. South Carolina Coastal Council*] severely restricted the nuisance exception by limiting it to common law nuisances." *Bowen*, 675 So. 2d at 631. The District Court of Appeal's decision is contrary to the Fifth Amendment and misconstrues *Lucas* and other decisions of this Court. Moreover, the District Court of Appeal's decision creates a conflict among state courts and threatens the ability of local and state governments to battle drug, prostitution, and gang-related activity, as well as housing and health code violations that rise to the level of a public nuisance. It defies logic and can only lead to government by purchase to conclude that the Just Compensation Clause of the Fifth Amendment requires the public at large to bear the burden when government temporarily interrupts the use of property to abate as a public nuisance a clearly illegal use of property.

I. The District Court of Appeal's Interpretation of the Fifth Amendment's Requirements Regarding Just Compensation Conflicts With This Court's Decisions.

Bowen radically departs from this Court's precedents. This Court has never suggested that the abatement of traditional public nuisances (whether statutorily or common law based) such as illegal drug activity requires the payment of just compensation. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n.22 (1987) (noting that no compensation is due when a State "diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance")[1] Indeed, just this year this Court held that the complete forfeiture of nuisance-related property does not implicate the Takings Clause. *Bennis v. Michigan*, 116 S. Ct. 994, 1001 (1996). It would be anomalous to call for compensation when a governmental body seeks to abate a nuisance through less invasive means: a one-year suspension of the property's use.

The Circuit Court found that the NAB's order had "deprived [Bowen] of all economic use of this property" during the one-year period. *Bowen*, 675 So. 2d at 631. *Lucas* instructs that in such cases a governmental entity need not provide compensation if it "duplicate[d] the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally[.]" 505 U.S. at 1029. The NAB's order clearly falls within the public nuisance exception delineated in *Lucas*. Pursuant to a grant of authority from the Florida legislature, the NAB merely acted to abate a nuisance that affected the public.

Contrary to the District Court of Appeal's suggestion, *Lucas* did not limit the public nuisance defense to common

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[1] Recently, the traditional power to abate a public nuisance without running afoul of the Fifth Amendment was again recognized in *Porter v. DiBlasio*, 93 F.3rd 301, 310 (7th Cir. 1996), which correctly applied this Court's precedents. The analysis in *Porter* further demonstrates the radical departure in this case.

law public nuisances. The Fifth Amendment, as *Lucas* explains, is concerned about fair treatment for private property owners. There are certain circumstances in which the public at large, rather than an individual property owner, should bear the costs of a governmental action or program. As *Lucas* emphasizes, this is especially the case where government imposes new restrictions on the use of property and thereby destroys all value in that property. *Id.* at 1029-30. *Lucas* noted, however, the "unexceptional" proposition that "the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by . . . 'existing rules or understandings.'" *Id.* at 1030. Clearly, existing rules and understandings, as codified in the Florida legislature's pronouncements regarding public nuisances, precluded property from being used in repeated illegal drug transactions.

Indeed, the illegal activities in this case have been considered public nuisances in this jurisdiction even before Florida entered the Union. In 1832, for example, the Florida territorial legislature recognized as public nuisances activities that "tend to annoy the community or injure the health of its citizens in general, or to corrupt the public morals." 1832 Fla. Terr. Laws No. 55, § 47. In 1917, the Florida legislature offered specific examples of public nuisances: "any house or place of prostitution, assignation, lewdness or place or building where games of chance are engaged in violation of law or *any place where any law of the State of Florida is violated*[.]" 1917 Fla. Laws ch. 7367, § 1 (emphasis added). In 1969, the Florida legislature deemed as public nuisance any place, including any building, that is "used for the illegal keeping, selling or delivery" of illegal drugs. 1969 Fla. Laws ch. 69-364, § 1 (codified at Fla. Stat. § 823.10). Finally, in 1987, the Florida legislature provided local governments a new enforcement mechanism to combat drug-related nuisances by authorizing nuisance abatement boards, as quasi-judicial bodies, to order the closure of a building for up to one year if the building constituted a public nuisance because of drug activity. 1987 Fla. Laws ch.

87-243, § 7 (codfied at Fla. Stat. § 893.138). Obviously, any "objectively reasonable application" of the principles articulated in this statutory history compels the conclusion that the use of property as an illegal drug market does not inhere in an owner's title. See *Lucas*, 505 U.S. at 1032 n.18.

An underlying theme of the Fifth Amendment (and in *Lucas*) is that just compensation may be due if government changes the rules governing property and thereby interferes with a property owner's reasonable investment-backed expectations. Property owners "must not be frustrated by a shifting background of state law." *Lucas*, 505 U.S. at 1033 (Kennedy, J., concurring in the judgment). In this case, however, Bowen may not claim that he is the victim of "a shifting background of state law." He acquired The Lorraine Apartments in 1991. For over 150 years prior to Bowen's acquisition of The Lorraine Apartments, it had been the law of Florida that a public nuisance is an activity that annoys the community, injures its citizens' health, or corrupts the public's morals. For over 70 years, it had been the law of Florida that a public nuisance included any building where any law of the State of Florida is violated. For a dozen years, it had been the law of Florida that a public nuisance included any place used for illegal drug activity. In light of these existing rules and understandings, Bowen may not claim that his expectations were interfered with or that he has been treated unfairly. Thus, the District Court of Appeal's decision to award just compensation in these circumstances is contrary to this Court's decisions.[2]

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[2]The District Court of Appeal also incorrectly identified the nature of the nuisance activity for purposes of Fifth Amendment analysis. The District Court of Appeal focused on the property's use as an apartment building, rather than the building's use in drug activity. While the District Court of Appeal's observation that "[t]here is no common law doctrine which prohibits the use of a building for rental purposes" is undoubtedly true, it is irrelevant. The appropriate inquiry is whether a building constitutes a nuisance because of its use in drug activity, including the repeated sale of cocaine. With the issue properly framed, the answer is clear: a building (whether apartment building or free-standing house) that is the location of repeated illegal drug transactions constitutes a public nuisance. *Cf. Bennis v. Michigan*, 116 S. Ct. 994 (1996) (automobile declared to be a public nuisance as a consequence of its use in solicitation of prostitution).

II. The District Court of Appeal's Decision Creates a Conflict Among State Courts and Threatens the Ability of Government to Abate Traditional Public Nuisances.

When abating traditional public nuisances, state and local governments are frequently authorized to destroy or close down property. No other state court has held that the Fifth Amendment requires the payment of just compensation in such situations. *See, e.g., Minot v. Freelander*, 426 N.W.2d 556 (N.D.1988) (demolition of house because of unsanitary conditions does not constitute a taking); *Starzenski v. Elkhart*, 659 N.E.2d 1132 (Ind. Ct. App.), *petition for cert. filed*, 65 U.S.L.W. 3181 (U.S. Aug. 29, 1996) (No. 96-350) (removal of trash and debris from property is not a taking); *Raynor v. Maryland Dept. of Health and Mental Hygiene*, 110 Md. App. 165, 676 A.2d 978 (1996) (destruction of pet ferret that bit child is not a compensable taking). The District Court of Appeal's decision that a one-year closure of a building that was the site of repeated illegal drug transactions requires just compensation creates an obvious and serious conflict.

The greatest immediate impact will be felt within the State of Florida. The decision will discourage all nuisance abatement boards in Florida from ordering the temporary closure of crack houses, houses of prostitution, and dwellings used by street gangs. To do so in light of *Bowen* would invite a takings claim. Moreover, the decision of a district court of appeal is binding on all trial courts in the State unless it is subsequently overruled by the Florida Supreme Court or reversed by this Court. *Pardo v. Florida*, 596 So. 2d 665, 666 (1992).

Finally, allowing *Bowen* to become part of takings jurisprudence will threaten the viability of nuisance abatement programs in other States as well. At least twenty States statutorily define a public nuisance to include buildings used in illegal drug transactions.[3] These States generally authorize, as part of the abatement process, the issuance of an order that closes down the premises.[4] *Bowen* should not be permitted to place at risk these critical efforts of State and local governments to combat activities that have long been regarded as threats to a community's well-being.

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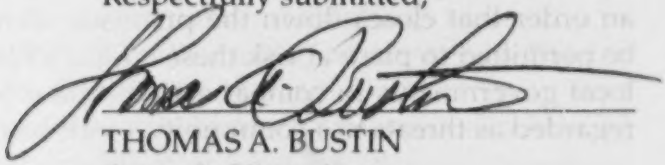
[3]Ala. Code § 6-5-155.1(3) (Supp. 1996); Alaska Stat. § 09.50.170 (1995); Ark. Code Ann. § 16-105-402 (Michie Supp. 1995); Cal. Health & Safety Code § 11570 (West 1991); Colo. Rev. Stat. Ann. § 16-13-303 (West Supp. 1996) Conn. Gen. Stat. Ann. § 21a-259 (West 1994); Ill. Comp. Stat. Ann. ch. 720, ¶ 5/37-1 (West 1993); Mass. Ann. Laws ch. 139, § 16 (Law. Co-op. 1995); Mich. Comp. Laws Ann. § 600.3801 (West 1987); Miss. Code Ann. § 41-29-309 (1993); Mo. Ann. Stat. § 195.130 (Vernon 1996); N.H. Rev. Stat. Ann. § 318-B:16 (Supp. 1995); N.J. Stat. Ann. § 24:21-35 (West Supp. 1996); N.C. Gen. Stat. § 19-1.2 (Michie Supp. 1996); Or. Rev. Stat. § 105.555 (1989); 42 Pa. Cons. Stat. Ann. § 8382 (West Supp. 1996); Utah Code Ann. § 78-38-9 (1996); Va. Code Ann. § 18.2-258 (Michie 1996); Wash. Rev. Code Ann. § 7.43-010 (West 1992); Wis. Stat. Ann. § 823.113 (West 1994).

[4]Ala. Code § 6-5-156.3 (Supp. 1996); Alaska Stat. § 09.50.210 (1995); Ark. Code Ann. § 16-105-412 (Michie Supp. 1995); Cal. Health & Safety Code § 11573.5 (West 1991); Colo. Rev. Stat. Ann. § 16-13-309 (1990); Ill. Comp. Stat. Ann. ch. 720, ¶ 5/37-4 (West 1993); Mass. Ann. Laws ch.139, § 16A (Law. Co-op. 1995); Mich. Comp. Laws Ann § 600.3810 (West 1987); Miss. Code Ann. § 95-3-15 (1993); Mo. Ann. Stat. § 195.130 (Vernon 1996); N.H. Rev. Stat. Ann. § 544:31 (Supp. 1974); N.J. Stat. Ann. § 2C:33-12.1(West 1996); N.C. Gen. Stat. § 19-5 (Michie Supp. 1996); Or. Rev. Stat. § 105.580 (1989); 42 Pa. Cons. Stat. Ann. § 8389 (West Supp. 1996); Va. Code Ann. § 18.2-258.01 (Michie 1996); Wash. Rev. Code Ann. § 7.43.090 (West 1992); Wis. Stat. Ann. § 823.113 (West 1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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October, 1996

APPENDIX A

CITY OF ST. PETERSBURG,
Florida, Appellant,

v.

William A. BOWEN, as Trustee of the William A. Bowen Trust Agreement, Appellee.

No. 95-03437.

District Court of Appeal of Florida,
Second District.

May 22, 1996.

Rehearing Denied June 18, 1996.

Michael S. Davis, City Attorney, and John Thor White, Assistant City Attorney, St. Petersburg, for Appellant.

Robert A. Butterworth, Attorney General, and Wendy S. Morris, Assistant Attorney General, Tallahassee, for Amicus Curiae State of Florida

Robert H. Willis, Jr. of Skelton, Willis Bennett, St. Petersburg, for Appellee.

CAMPBELL, Acting Chief Judge.

Appellant, City of St. Petersburg, Florida (City), challenges the summary judgment which resolved the issue of liability in favor of appellee, William A. Bowen, as Trustee of the William A. Bowen Trust Agreement (Bowen), in Bowen's inverse condemnation action against the City. We have jurisdiction pursuant to Rule 9.130(a)(3)(C)(iv). After a review of the record before us, we conclude that the trial judge's summary judgment was a correct application of the pertinent law to the undisputed facts of the case. We affirm.

In 1991, Bowen acquired ownership of The Lorraine Apartments in St. Petersburg. The City, in 1993, filed an administrative complaint with its Nuisance Abatement Board

(NAB) against Bowen alleging that The Lorraine Apartments constituted a nuisance by virtue of the purported use of drugs by tenants and other persons at the property. No unlawful activity on the part of Bowen was alleged. The City's complaint was filed pursuant to section 893.138, Florida Statutes (1991) and the City's enabling ordinance which substantially tracks the statute. *See* 19-66 to 19-71, St. Petersburg City Code. Section 893.138 provides as follows:

(1) Any place or premises that has been used on more than two occasions, within a 6-month period, as the site of the unlawful sale or delivery of controlled substances or as the site of a violation of s. 796.07, or any place or building used by a youth and street gang for the purpose of conducting a pattern of youth and street gang activity may be declared to be a public nuisance, and such nuisance may be abated pursuant to the procedures provided in this section.

(2) Any county or municipality may, by ordinance, create an administrative board to hear complaints regarding the nuisances described in subsection (1). Any employee, officer, or resident of the county or municipality may bring a complaint before the board after giving not less than 3 days' written notice of such complaint to the owner of the place or premises at his last known address. After a hearing in which the board may consider any evidence, including evidence of the general reputation of the place or premises, and at which the owner of the premises shall have an opportunity to present evidence in his defense, the board may declare the place or premises to be a public nuisance as described in subsection (1).

(3) If the board declares a place or premises to be a public nuisance, it may enter an order immediately prohibiting:

(a) The maintaining of the nuisance;

(b) The operating or maintaining of the place or premises; or

(c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.

(4) An order entered under subsection (3) shall expire after 1 year or at such earlier time as is stated in the order.

(5) An order entered under subsection (3) may be enforced pursuant to the procedures contained in s. 120.69. This subsection does not subject a municipality that creates a board under this section, or the board so created. to any other provision of chapter 120.

(6) The board may bring a complaint under s 60.05 seeking temporary and permanent injunctive relief against any nuisance described in subsection (1).

(7) This section does not restrict the right of any person to proceed under s. 60.05 against any public nuisance.

After a hearing on the City's complaint, the NAB ordered The Lorraine Apartments closed for a period of one year effective August 16, 1993. As a consequence of the ruling, Bowen was unable to put The Lorraine Apartments to any economic use and the property's fair market value was substantially diminished. Bowen has received no compensation from the City.

On August 11, 1993, Bowen filed a complaint for inverse condemnation against the City in circuit court. Bowen alleged that the closure of The Lorraine Apartments constituted a taking for a public purpose requiring just compensation under the Fifth and Fourteenth Amendments of the United States Constitution and article X, section 6, and article I, section 9 of the Florida Constitution. The City moved to dismiss Bowen's complaint, asserting in part that an action for inverse condemnation may not arise from a temporary taking. On January 19,1994, the trial judge granted the City's motion by finding that "the closing of The Lorraine Apartments, for one year, is a temporary taking. An action for inverse condemnation does not arise from a temporary taking." From that decision, Bowen filed an appeal and, on September 28, 1994, this court reversed per curiam, citing *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla.1994). *Bowen v. City of St. Petersburg, Fla.*, 642 So. 2d 837 (Fla. 2d DCA 1994).

On remand, both the City and Bowen moved for summary judgment upon stipulated facts.

On July 6, 1995, summary judgment was entered for Bowen. The trial judge found that the City imposed a temporary loss of all economic use of the apartments. The trial court also held that use of the property as an apartment house was not a nuisance at common law. The trial court concluded Bowen was entitled to compensation for the one-year taking of his property with the total amount of such compensation to be determined subsequently by the court.

At the outset, we note that the action of closing completely the apartments for one year was, in regard to Bowen's property rights, one of the most invasive methods of abating the purported nuisance that was available. In this appeal, we are presented with the narrow issue of whether the complete closure of The Lorraine Apartments for one year in order to curtail the illegal use of drugs by tenants and others was a compensable taking by the City.

As support for the summary judgment for Bowen, the trial judge has entered in "Order Granting Summary Judgment In Favor Of Plaintiff, William A. Bowen, Trustee." That order is complete, concise, scholarly and well-grounded. We see no need to attempt to add our reassessment to those findings and conclusions and, therefore, set forth below the trial judge's order, in full, and adopt it as our own:

> Both Plaintiff, William A. Bowen, Trustee and Defendant, City of St. Petersburg, have filed Motions for Summary Judgment and submitted this case for decision as a matter of law on the stipulated facts as revealed in the record. Neither party asserts that there are any controverted issues of fact.
>
> This is a Complaint for Inverse Condemnation. The City of St. Petersburg, through its Nuisance Abatement Board ordered the 15 unit apartment building, Lorraine Apartments, on land owned by Plaintiff, to be shut down for a one year period. The land and building can be put to no other use during this one year close down period.

The plaintiff does not contest the findings of the Nuisance Abatement Board (NAB) nor does the complaint allege that the one-year closure was not a proper exercise of police power. Plaintiff merely alleges that the closure is a compensable taking for which there has been no payment. He does not allege that the NAB findings of fact were unfounded or that its closure order was contrary to the Ordinance of the City.

The Florida Supreme Court in *Joint Ventures, Inc. v. Dept. of Transportation*, 563 So. 2d 622 (Fla.1990) and again in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corporation*, 640 So. 2d 54 (Fla.1994) has clearly recognized that if the state, through the use of its police power, deprives the owner of property of the economically viable use of his property, then that property owner must be compensated. Also, in these cases, the Florida Supreme Court recognized that temporary takings are compensable.

Regulations found by the courts to be invalid because they deprive landowners of substantially all use of their property without compensation are not ordinarily struck down as unconstitutional. The government is forced to choose between paying just compensation to keep the regulation in effect or removing the regulation.

> [T]he state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner. *Joint Ventures*, 563 So. 2d at 624 (footnotes omitted).

Based upon the *A.G.W.S.* case and the *Joint Ventures* case, as well as numerous United States Supreme Court cases, if the closure of the Lorraine Apartments by the nuisance abatement board resulted in depriving the owner of all economic use of the property, even if this deprivation was temporary, then as a matter of law there

is deemed to have been a taking and the property owner is entitled to be compensated for the economic loss suffered.

First English [Evangelical] Lutheran Church v. County of Los Angeles, 482 U.S. 304 [107 S.Ct. 2378, 96 L.Ed.250] (1987) address the issue of compensating a landowner for a temporary taking. In that case it was held that:

> A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation.
>
> "Temporary" regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation. Once a court determines that a taking has occurred, the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. But where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Invalidation of the ordinance without payment of the fair value for the use of the property during such period would be a constitutionally insufficient remedy.

The City has placed great weight in its theory that by use of its police power it can avoid having to compensate the plaintiff even if the action of the NAB deprives the plaintiff of all economic use of his property. This belief by the City is misplaced.

We look for guidance to the case of *Lucas v. South Carolina Coastal Council*, [505 U.S. 1003] 112 S.Ct. 2886 [120 L.Ed.2d 798] (U.S.1992). In that case, Mr. Lucas owned some beach front property in South Carolina that he wished to develop.

The South Carolina legislature subsequent to his acquisition of the property passed a statute called "The Beachfront Management Act" which essentially prevented Mr. Lucas from developing his property. Mr. Lucas then filed suit contending the legislature effected a taking of his property without just compensation.

Mr. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. The Trial Court agreed.

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the Beachfront Management Act [was] properly and validly designed to preserve ... South Carolina's beaches."

The South Carolina Supreme Court ruled that when a regulation respecting the use of property is designed to prevent serious public harm[1], no compensation is due under the takings clause[2] regardless of the regulation's effect on the property's value. The United States Supreme Court disagreed with that ruling and reversed.

---

[1]In the case at bar there is no doubt that the ordinance is designed to prevent serious public harm by impacting on the use or sale of illegal drugs.

[2]The complaint in the case at bar alleges that compensation is required under the taking clauses of both the 5th Amendment and Art. X, § 6(a) of the Florida Constitution and generally as a matter of 'due process'.

There is no doubt that the 5th Amendment taking clause is applicable to the states through the 14th Amendment. *Penn Central Transportation Co., et al., v. NYC, et al.*, [438 U.S. 104, 108, fn 3, 98 S.Ct. 2646, 2650 fn 3] 57 L.Ed.2d 631. 659 fn 3: reh den [439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (— [1978]). *Penn Central* also informs that the term 'property' is not the physical thing; rather it is the ***group of rights*** inherent in the citizen's relationship to the physical thing. such as the right to possess, use, and dispose of one's land. At issue then is the deprivation to the owner, not the accretion to the sovereign.

The United States Supreme Court held that if a state or municipality seeks to sustain a regulation that deprives a landowner of all economically beneficial use, it must compensate the owner unless "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interest was not part of his title to begin with." In other words, unless the government can show that the landowner had no reasonable expectation of the proposed use when he acquired the property, the owner must be compensated for denial of that use.

In order to prevail on its affirmative defense of the nuisance exception, the City has the burden of proving that when Mr. Bowen purchased the property, he had no reasonable expectation that the Lorraine Apartments could be used as rental apartments, as that is the use which has now been proscribed.

The *Lucas* case limits the nuisance exception to those cases involving a common law nuisance. In the present case, there is no common law nuisance being prevented by the closure. The prohibited activity was *any* use of the apartment building. The NAB order did not really proscribe any particular nuisance, such as would be done by enjoining the sale or use of drugs on the premises. Such an injunction would leave other legal uses available to the Plaintiff, but the order involved here left no use available.

There is no common law nuisance doctrine which prohibits the use of a building for rental purposes. The nuisance exception applies only to restrictions to use which were inherent in an owner's fee simple estate; a use which was not part of his title initially.

In *Lucas*, the Court recognized two categories of regulatory action which are compensable without inquiry into the public interest advanced in support of the restraint: (1) where the regulation compels the landowner to suffer a physical invasion upon the property, or (2) where the regulation denies all economically beneficial or productive use of the land. It is the second category of actions under which Plaintiff claims relief in the instant case.

Lucas held that "[i]n the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life. Total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." Id. [at 1017, 112 S.Ct.] at 2894, citing *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 [101 S.Ct. 1287, 1304, 67 L.Ed.2d 551] (1981).

Lucas further states that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of a common good, that is, to leave his property economically idle, he has suffered a taking. *Id* .[at 1019, 112 .Ct.] at 2895. In these situations, "the functional basis for permitting the government to effect property values by regulation, without compensation, does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses." *Id*

There can really be no question that by virtue of its closing order, the Nuisance Abatement Board has deprived the Plaintiff of all economic use of this property. The property, a 15 unit apartment building, can be put to no other use during the close down period. If deprived of all economic use, a taking has occurred. The law is equally clear that a temporary taking is compensable. In *A.G.W.S.*, supra, at 58, the court said:

> "A taking occurs where regulation denies substantially all economically beneficial or productive use of land. Moreover, a temporary deprivation may constitute a taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

The only real issue in this case is whether the nuisance exception is applicable. Prior to the *Lucas* decision, the nuisance exception argument was a viable defense in many

cases, although not automatic. *Lucas* severely restricted the nuisance exception by limiting it to common law nuisances.

The fact that the City did not take title to the Bowen property (it was merely closed for one year) does not defeat the 'taking' aspect of plaintiff's claim in this case.

In *A.G.W.S.*, supra, the court said at 57, "... government may so intrusively regulate the use of property in pursuit of legitimate police power objectives as to take the property without compensation, in violation of the just compensation clause. "'[t]he government action is invalid absent compensation. and so government may either abandon its regulation or validate its action by payment of appropriate compensation, i.e., by exercising its power of eminent domain."

During World War II private property was appropriated by the United States. Though the takings were temporary there was no question that compensation would be required for the Government's interference with the use of the property. See the case of *Kimbal [Kimball] Laundry Co. v. United States*, 388 [338] U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 [1949]; *United States v. Petty Motor* 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 [1946]; *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311[1945].

If the City of St. Petersburg wants to wage a war on drugs in part by means of this type of temporary taking then the City will be required to pay landowners just compensation.

Invalidation of the ordinance is not a sufficient remedy to meet the demands of the Just Compensation Clause under the Fifth Amendment of the U.S. Constitution or under Art. X, § 6(a) of the Florida Constitution.

As the Florida Supreme Court in *Joint Ventures* noted:

> "The state must pay when it regulates private property under its police power in such a manner that the regulation effectively deprives the owner of the economically viable use of that property, thereby unfairly imposing the burden of providing for the public welfare upon the affected owner."

The Court concludes that Plaintiff is entitled to a summary judgment order to the effect that he is entitled to compensation for the one year taking of his property. He is entitled to payment of the fair value for the use of the property for one year. The manner in which the total amount of compensation will be fixed has not yet been determined. The parties may, by motion, present this issue to the Court.

Affirmed.

FRANK and BLUE, JJ., concur.

APPENDIX B

Supreme Court of Florida

THURSDAY, AUGUST 29, 1996

CITY OF ST. PETERSBURG, FLORIDA,
Petitioner,

v.

WILLIAM A. BOWEN, etc.,
Respondent.

CASE NO. 88,373

District Court of Appeal,
2nd District - No. 95-03437

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

Respondent's Motion for Attorney's Fees is granted; and said attorney is hereby allowed a fee of one thousand dollars ($1,000.00) for services in this Court, said sum to be paid to said attorney by petitioner after final disposition of this cause.

KOGAN, C.J., OVERTON, SHAW, GRIMES and HARDING, JJ., concur

TC
cc: Hon. William A. Haddad, Clerk
Hon. Karleen F. DeBlaker, Clerk
Hon. Horace A. Andrews, Judge

Mr. Michael S. Davis
Mr. Thomas A. Bustin
Mr. Robert H. Willis, Jr.
Ms. Wendy S. Morris

APPENDIX C

NUISANCE ABATEMENT BOARD OF THE CITY OF ST. PETERSBURG. FLORIDA

COMPLAINT NO. 93-006

CITY OF ST. PETERSBURG,
Petitioner,

vs.

WILLIAM A. BOWEN, Trustee
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS CAUSE came on for public hearing before the Nuisance Abatement Board on July 14, 1993, after due notice to the Respondent, and the Board having duly considered all testimony under oath, evidence received, and heard arguments thereupon, issues its Findings of Fact, Conclusions of Law, and Order as follows:

I. FINDINGS OF FACT

1. The place or premises located at 324 Grove Street North, St. Petersburg, Florida was used on more than two (2) occasions as the site for the unlawful sale or delivery of controlled substances, to wit: cocaine.

2. The evidence proved that detectives from the St. Petersburg Police Department, either using a Confidential Informant or directly, made purchases of cocaine on four occasions, all within a six-month period.

3. The Board has jurisdiction and the owner of the property, Mr. William A. Bowen, Trustee was properly notified of the hearing.

II. CONCLUSIONS OF LAW

1. St. Petersburg City Ordinance 1137-F (Code Sections 16-96 through 19-71) and Section 893.138, Florida Statutes, provide that any place or premises which has been used on more than two (2) occasions as the site of the unlawful sale or delivery of controlled substances may be declared to be a public nuisance, which public nuisance may be abated pursuant to the procedures provided in the aforementioned provisions of the St. Petersburg, City Ordinance and the Florida Statutes.

2. The Board hereby declares that the place or premises located at 324 Grove Street North, St. Petersburg, Florida constitutes a public nuisance as described by Ordinance and Statute.

Based upon the foregoing Findings of Fact, and Conclusions of Law, it is hereby ORDERED:

A. The premises located at 324 Grove Street North, St. Petersburg, Florida is ordered closed, effective August 16, 1993, for a period of one (1) year, after which this Order shall become null and void. The 30 day time period for closure of the property is granted to permit existing tenants an opportunity to find other housing. Further, between July 14, 1993 and August 14, 1993, no portion of the property may be rented to a new tenant nor shall any existing tenant's lease be extended during this time period.

B. The Board retains jurisdiction to enforce or modify the provisions of this order.

DONE and ORDERED in St. Petersburg, Pinellas County, Florida this, 20th day of July, 1993.

/S/

Catherine C. Prats
Chairman, N.A.B.

APPENDIX D

893.138. Local administrative action to abate drug-related or prostitution-related public nuisances and youth and street gang activity

(1) Any place or premises that has been used on more than two occasions, within a 6-month period

(a) As the site of a violation of s. 796.07;

(b) As the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

(c) On one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony and that has been previously used on more than one occasion as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance; or

(d) Any place or building used by a youth and street gang for the purpose of conducting a pattern of youth and street gang activity may be declared to be a public nuisance, and such nuisance may be abated pursuant to the procedures provided in this section.

(2) Any county or municipality may, by ordinance, create an administrative board to hear complaints regarding the nuisances described in subsection (1). Any employee, officer, or resident of the county or municipality may bring a complaint before the board after giving not less than 3 days' written notice of such complaint to the owner of the place or premises at his last known address. After a hearing in which the board may consider any evidence, including evidence of the general reputation of the place or premises, and at which the owner of the premises shall have an opportunity to present evidence in his defense, the board may declare the place or premises to be a public nuisance as described in subsection (1).

(3) If the board declares a place or premises to be a public nuisance, it may enter an order requiring the owner of such place or premises to adopt such procedure as may be

appropriate under the circumstances to abate any such nuisance or it may enter an order immediately prohibiting:

(a) The maintaining of the nuisance;

(b) The operating or maintaining of the place or premises, including the closure of the place or premises or any part thereof; or

(c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.

(4) An order entered under subsection (3) shall expire after 1 year or at such earlier time as is stated in the order.

(5) An order entered under subsection (3) may be enforced pursuant to the procedures contained in s. 120.6. This subsection does not subject a municipality that creates a board under this section, or the board so created, to any other provision of chapter 120.

(6) The board may bring a complaint under s. 60.05 seeking temporary and permanent injunctive relief against any nuisance described in subsection (1).

(7) This section does not restrict the right of any person to proceed under s. 60.05 against any public nuisance.

(8) As used in this section, the term "controlled substance" includes any substance sold in lieu of a controlled substance in violation of s. 817.563 or any imitation controlled substance defined in s. 817.564.

Historical and Statutory Notes

Derivation:

Laws 1994, c. 94-242, § 1.
Laws 1993, c. 93-227, § 6.
Laws 1991, c. 91-143, § 1.
Laws 1990, c. 90-207, § 2.
Laws 1987, c. 87-243, § 7.

Laws 1990, c. 90-207, § 2, eff. July 1, 1990, in the section heading and in subsec. (1), included provisions relating to youth and street gang activity.

Laws 1991, c. 91-143, § 1, eff. Oct. 1, 1991, substituted "that has" for "which have" and inserted ", within a 6-month period" and "or as the site of violation of s. 796.07," in subsec. (1), inserted new subsec. (5), redesignated former subsecs. (5) and (6) as subsecs. (6) and (7), and substituted in subsec. (6) "temporary and permanent injunctive relief" for "a permanent injunction " .

Laws 1993, c. 93-27, § 6, eff. Oct. 1, 1993, reenacted subsec. (1) for the purpose of incorporating the amendment to 796.07 in a reference thereto.

Laws 1994, c. 94-242, § 1, eff. Oct. 1, 1994, substantially rewrote subsecs. (1) and (3), and added subsec. (8). Prior to amendment subsecs. (1) and (3) provided:

"(1) Any place or premises that has been used on more than two occasions, within a 6-month period, as the site of the unlawful sale or delivery of controlled substances or as the site of a violation of s. 796.07, or any place or building used by a youth and street gang for the purpose of conducting a pattern of youth and street gang activity may be declared to be a public nuisance, and such nuisance may be abated pursuant to the procedures provided in this section."

"(3) If the board declares a place or premises to be a public nuisance, it may enter an order immediately prohibiting:

"(a) The maintaining of the nuisance;

"(b) The operating or maintaining of the place or premises: or

"(c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance."

APPENDIX E

ST. PETERSBURG CITY CODE

ARTICLE II. DRUG RELATED NUISANCES

DIVISION 1. GENERALLY

Secs. 19-51—19-65. Reserved.

DIVISION 2. NUISANCE ABATEMENT BOARD*

Sec. 19-66. Creation; composition; term of office.

(a) There is hereby created and established a board to be known and designated as the "Nuisance Abatement Board."

(b) Such Board shall consist of seven members, and two alternates, who are residents of the City of St. Petersburg, serving without pay, appointed by the Mayor and confirmed by City Council.

(c) The terms of members of the Board, except for the terms of the initial members, shall be for three years. Initial appointment to this Board shall be staggered with three members appointed for terms of three years, two members appointed for terms of two years, and two members appointed for terms of one year. The terms of the initial alternates shall be staggered, with one alternate appointed for a one-year term and one alternate appointed for a two-year term. The terms of alternates, except for the initial alternates, shall be two years. Any vacancy shall be filled for the remainder of the unexpired term.

(Ord. No. 1137-F, §1, 11-2-89; Ord. No. 1149-F, § 1, 12-21-89; Ord. No. 10G, §1, 7-6-93; Ord. No. 128-G, § 3, 4-7-94)

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*Cross reference—Boards, commissions, etc., § 2-296 et seq.

State law reference—Drug abuse nuisance abatement boards, F.S. § 893.138.1947

Sec. 19-67. Powers and duties.

(a) The Nuisance Abatement Board shall have the power to adopt rules for the administration and conduct of its hearings. Such rules shall not be inconsistent with this article and the rules of procedure adopted by the City Council. Such rules shall be designed to facilitate the efficient administration of this article and shall always ensure fundamental due process.

(b) The Board shall have the power to subpoena alleged violators and witnesses to its hearings. Such subpoenas may be served by the City's Police Department, or by such other persons as the Board may appoint.

(c) The Board shall have the power to subpoena evidence, records and other material relevant to the proceedings.

(d) The Nuisance Abatement Board shall hear complaints alleging that any place or premises constitutes a public nuisance, and may find said place or premises, or any part thereof, to be a public nuisance, upon clear and convincing, and competent evidence that said place or premises has been used on one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony and that has been previously used on more than one occasion, all within a 6-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance; or, has been used on more than two occasions, all within a 6-month period:

(1) As the site of a violation of § 796.07, Florida Statutes;

(2) As the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;

(3) By a youth and street gang for the purpose of conducting a pattern of youth and street gang activity;

For the purpose of this article "place or premises" means the land and its appurtenances and structures thereon as such land is described or contained in the deed or instrument of conveyance as same is recorded in the Public Records of Pinellas County, Florida.

For the purpose of this article "controlled substance" includes any substance sold in lieu of a controlled substance in violation of § 817.563, Florida Statutes, or any imitation controlled substance defined in § 817.564, Florida Statutes.

(e) Any employee, officer or resident of the City may file a complaint with the Board.

(1) Such complaint shall be reviewed by the City Attorney or a regular or special Assistant City Attorney for legal sufficiency.

(2) If the reviewing attorney has reason to believe a public nuisance exists on the premises, a formal notice of hearing shall be filed.

(3) The Board, through its Recording Secretary, shall schedule a hearing and send a copy of the complaint and the notice of hearing by certified mail, return receipt requested, or hand delivered, to the owner of the place or premises complained of at the last known address of such owner, postmarked at least ten business days prior to the scheduled hearing.

If an attempt to reach the owner and/or operator by hand delivery or certified mail is unsuccessful, notice of the hearing may be made by publication as provided in F.S. ch. 49. Notice must effectively provide the owner of the place or premise three days' notice.

(4) The notice of hearing shall include:

a. A statement of the time, place and nature of the hearing.

b. A statement of the legal authority and jurisdiction under which the hearing is to be held.

c. A reference to the particular sections of the statutes and ordinances involved.

d. Copy of the complaint.

(f) The Board shall conduct a public hearing on the complaint, receiving evidence pertaining to the alleged unlawful sale or delivery of controlled substances, the

alleged pattern of youth and street gang activities, or the alleged violation of F.S. § 796.07 at the site. The Board may also consider evidence of the general reputation of the place or premises.

(g) The owner of the place or premises shall have the opportunity to appear before the Board, in person and/or through legal counsel, to offer evidence in defense of such owner.

(h) All testimony shall be under oath and shall be recorded. The Board shall not be bound by formal rules of evidence; however, it shall act to ensure fundamental due process in its hearing process.

(i) At the conclusion of the hearing, and based solely on the evidence received, the Board may find by a majority of the Board present and voting that the place or premises has been used as alleged in the complaint and that such place or premises thereby constitutes a public nuisance.

(j) If the Board does not find that the allegations of the complaint have been proved, it shall dismiss the complaint.

(k) If the Board finds the existence of a public nuisance, the Board may enter an oral order requiring the owner of such place or premises to adopt such procedure as may be appropriate under the circumstances to abate any such nuisance or it may enter an oral order immediately prohibiting:

(1) The maintaining of the nuisance;

(2) The operating or maintaining of the place or premises, including the closure of the place or premises or any part thereof; or

(3) The conduct, operation or maintenance of any business or activity on the premises which is conducive to such nuisance.

Such order shall expire after one year or at such earlier time as is stated in the order.

(l) Such order shall be approved by a majority of the Board present and voting, contain findings of fact and conclusions of law and state the affirmative relief granted by the Board. Such order shall be reduced to writing and mailed or hand delivered to the respondent within ten working days after the hearing.

(Ord. No. 1137-F, § 2, 11-2-89; Ord. No. 1149-F, § 2, 12-21-89; Ord. No. 2137-F, §§1—3, 1-9-92; Ord. No.203-G,§ 1, 8-10-95)

Sec. 19-68. Enforcement of orders.

(a) Any order issued by the Nuisance Abate ment Board shall expire after one year or at such earlier time as is stated in the order.

(b) The Board may bring a complaint under F.S. § 60.05 seeking a permanent injunction against any nuisance. The City Attorney or a regular or special Assistant City Attorney shall prosecute such action on behalf of the Board.

(Ord. No. 1137-F, § 3, 11-2-89)

Sec. 19-69. Appeals.

An aggrieved party, including the City, may appeal a final administrative order of the Nuisance Abatement Board to the Circuit Court of the Sixth Judicial Circuit. Such an appeal shall not be a hearing de novo, but shall be limited to appellate review of the record created before the Board. An appeal shall be filed within 30 days of the date of the written order appealed from.

(Ord. No. 1137-F, § 4, 11-2-89)

Sec. 19-70. Attendance, quorum.

(a) A member must be present for 75 percent of the meetings or the Chair shall declare the member's office vacant. A member must be present for 75 percent of the meeting to be considered present. A vacancy on the Board shall be filled by appointment by the City Council for the unexpired term of such former member.

(b) Any member who fails to attend two of three successive meetings without cause and prior approval of the Chair shall automatically forfeit the appointment and create a vacancy on the Board to be filled by the City Council for the unexpired term of such former member.

(c) A quorum of the Board shall consist of four or more members, and an affirmative vote of a majority of those present and voting shall be necessary to pass any motion or adopt any order.

(Ord. No. 1137-F, § 5, 11-2-89)

Sec. 19-71. Procedure.

(a) The rules of procedure attached to Ord. No. 1137-F are adopted as the procedures to govern the operation of the Board, until modified as provided therein.

(b) The rules of procedure may be altered by the City Council by resolution in a manner not inconsistent with the Florida Statutes and City ordinances. A City Council resolution adopted pursuant to this division shall not modify the rules except in a manner consistent with this division and the governing law and shall not expand the powers of the Board or deal with a subject not expressed in the rules.

(c) The Florida Rules of Civil Procedure may be used as a guideline to aid the Board in determining what procedures to follow in circumstances not covered by the Board's rules. However, the Board is not bound by such rules of civil procedure.

(d) All meetings, regular or special, and all hearings shall be open to the public in accordance with the provisions of the Florida "Sunshine Law" (F.S. ch. 286).

(e) All records of the Board shall be open to public examination, inspection and copying in accordance with the provisions of the Florida "Public Records Law" (F.S. ch. 119).

(Ord. No. 1137-F, § 6, 11-2-89)

Sec. 19-7- 19-100. Reserved.

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APPENDIX F

IN THE CIRCUIT COURT for
PINELLAS COUNTY, FLORIDA
Civil Division

WILLIAM A. BOWEN, as trustee of the William A. Bowen Trust Agreement, dated March 28, 1991,
Plaintiff,

v. Case No. 93-0028S9-CI-11

CITY OF ST. PETERSBURG,
Defendant.

DEFENDANT CITY'S MOTION FOR SUMMARY JUDGMENT

The defendant, CITY OF ST. PETERSBURG, through counsel, pursuant to Fla.R.Civ.P. 1.510(b) moves this Honorable Court for rendition of a final summary judgment in its favor as to the Complaint filed herein and in support of this Motion states that there are no genuine issues of material fact and the defendant City is entitled to a judgment as a matter of law.

The material undisputed facts in this case are:

1. Plaintiff WILLIAM A. BOWEN, as trustee of the William A. Bowen Trust Agreement dated March 28, 1991, was the fee simple owner of the real property which is the subject of this suit, to wit: the Lorraine Apartments, a 15-unit apartment building located in St. Petersburg, Florida.

2. The City of St. Petersburg's Nuisance Abatement Board ordered the Lorraine Apartments closed for one year, effective August 16, 1993. (A copy of the NAB's order is attached hereto and is incorporated herein by reference as **Exhibit "A"**)

3. Plaintiff suffered some measure of damages as a result of the subject closure; i.e. the fair market value immediately before August 16, 1993 was $145,000 and the fair market value immediately following closure was $82,000. (See Plaintiff's answers to Interrogatory 12 & 13 , attached as **Exhibit "B")**[1]

4. The Plaintiff received no compensation from the City for the damages aforementioned.

5. All lawful conditions precedent to the filing of this law suit have been met by the Plaintiff.

The substantial matters of law to be argued at the hearing of this Motion are:

6. The 1-year closure does not constitute a taking for public use within the context of the Fifth Amendment injunction *"...nor shall private property be taken for public use, without just compensation."* Hence, Plaintiff states no cause of action for a compensable taking.

7. No Fifth Amendment 'taking' occurred because the 1-year closure was within the "nuisance exception" to the taking guarantee. Similarly, the one year closure was premised upon Fla. Stat. 893.138 and therefore falls within the "police powers exception" even though the property's value was affected.

8. The 1-year closure was not the equivalent of a physical appropriation because the property retained substantial value immediately following the taking. Hence, no compensation is required by either the federal or Florida constitutions.

[1] The diminution of value alleged by plaintiff is admitted for purposes of this motion only, as discovery on 'damages' issues continues.

APPENDIX G

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA CIRCUIT CIVIL CASE NUMBER 93-002859-CI-011

WILLIAM A. BOWEN, as trustee of the William A. Bowen Trust Agreement, dated March 28, 1991,
Plaintiff,

vs.

THE CITY OF ST. PETERSBURG,
Defendant.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Plaintiff, WILLIAM A. BOWEN, as trustee of the William A. Bowen Trust Agreement dated March 28, 1991, by and through his undersigned counsel, pursuant to Florida Rules of Civil Procedure 1.510(b), moves this Honorable Court for the entry of Partial Summary Judgment in his favor as to the Complaint filed herein on the issue of liability and in support of this motion states that there are no genuine issues of material fact and the Plaintiff is entitled to a Partial Summary Judgment as a matter of law on the issue of liability.

MATERIAL UNDISPUTED FACTS

The material undisputed facts in this case are:

1. Plaintiff, William A. Bowen, as trustee of the William A. Bowen Trust Agreement dated March 28, 1991, was the fee simple owner of the real property which is the subject of this suit, to wit: the Lorraine Apartments, a 15 unit apartment building located in St. Petersburg, Florida.

2. The City of St. Petersburg's Nuisance Abatement Board ordered the Lorraine Apartments closed for one year effective August 16, 1993.

3. The Nuisance Abatement Order entered on July 20, 1993 deprived the Plaintiff, as property owner, of all economic use of the property as there was no other economic use the apartments could be put to during the one year close down period.

MATTERS OF LAW TO BE ARGUED

The substantial matters of law to be argued are as follows:

1. The Fifth Amendment to the United States Constitution provides that no person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation. As the regulation and Order of the Nuisance Abatement Board denies the land owner of all economic use of the land, a taking has occurred for which the property owner must be compensated.

/S/
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